

1 SHANNON LISS-RIORDAN, *pro hac vice*

2 (sliss@llrlaw.com)

3 ADELAIDE PAGANO, *pro hac vice*

4 (apagano@llrlaw.com)

5 LICHTEN & LISS-RIORDAN, P.C.

6 729 Boylston Street, Suite 2000

7 Boston, MA 02116

8 Telephone: (617) 994-5800

9 Facsimile: (617) 994-5801

10 MATTHEW CARLSON (SBN 273242)

11 (mcarlson@carlsonlegalservices.com)

12 Carlson Legal Services

13 100 Pine Street, Suite 1250

14 San Francisco, CA 94111

15 Telephone: (415) 817-1470

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SHERRY SINGER, RYAN WILLIAMS,
RYDER VANDERHEYDEN, STEVEN
GRANT, and MICHAEL TSAPATSARIS,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

POSTMATES, INC,

Defendant.

4:15-cv-01284-JSW

**PLAINTIFFS' RESPONSE TO DEFENDANT'S
OBJECTIONS TO PLAINTIFFS' REPLY
EVIDENCE AND OPPOSITION TO
DEFENDANT'S REQUEST FOR EVIDENCE
TO BE STRICKEN**

Judge: Hon. Jeffrey S. White

1 On September 4, 2015, Defendant Postmates, Inc. ("Postmates") filed an objection (Dkt. 48)
2 to Plaintiffs' reply evidence in support of Plaintiffs' Rely In Support of Plaintiffs' Motion For Notice
3 To Be Issued To Similarly Situated Employees Pursuant to 29 U.S.C. § 216(b) ("Plaintiffs' Reply")
4 (Dkt. 45-46). Postmates contends that Plaintiffs' evidence is improper and untimely, and, as such,
5 must be stricken under Civil L.R. 7-3(d)(1).¹ Such claims are meritless, and the Court should reject
6 Defendant's motion.

7 First, as set forth in Civil L.R. 7-3(c), Plaintiffs' evidence is neither improper nor untimely.
8 Civil L.R. 7-3(c) states (in relevant part) "[a]ny reply to an opposition may include affidavits or
9 declarations, as well as a supplemental brief or memorandum under Civil L.R. 7-4." Here, Plaintiffs'
10 attachment of evidence to its Reply is certainly permissible under Civil L.R. 7-3(c).²

11
12 Second, Defendant's reliance on Civil L.R. 7-3(d)(1) is also misplaced because Rule 7-
13 3(d)(1) permits an objection to reply evidence only where the moving party has submitted *new*
14 evidence.³ Presumably, this rule allows the non-moving party a chance to respond to evidence that
15 "came out of left field." Here, Plaintiffs' reply evidence was a mere supplement to evidence already
16 produced in Plaintiffs' Motion For Notice To Be Issued To Similarly Situated Employees Pursuant to
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18 ¹ Postmates also notes in its opposition that it intends to file an administrative motion for
19 leave to file a surreply to respond to Plaintiff's reply evidence, Dkt. 48 at FN 1, although it has
20 not done so yet, and it would appear to now be too late, as it has been three weeks since
21 Plaintiffs' reply was filed, and the hearing on Plaintiffs' motion is scheduled for next week,
22 September 25, 2015.

23 ² Notably, the court in Moua v. Int'l Bus. Machines Corp., found that the defendant's
24 reliance on Civil L.R. 7-3(d)(1) to object to declarations attached to the plaintiff's reply brief
25 was "misplaced" because "Local Rule 7-3(c) makes it clear that [] any reply to an opposition
26 may include affidavits or declarations." 2013 WL 685220, *4 (N.D. Cal. Feb. 25, 2013) (internal
27 quotations omitted).

28 ³ Defendant cites Golden West Fin. V. WMA Mortgage Servs., Inc., 2003 U.S. Dist.
LEXIS 4100, *12-13 (N.D. Cal. Mar. 13, 2003) for the principle that new evidence should be
stricken where the plaintiff offers "no justification for their failure to submit their [] evidence in
connection with their initial moving papers." In Golden West Fin., the court struck evidence
submitted in a reply brief where the plaintiff had failed to offer *any* evidence in its initial moving
papers. *Id.* Here, Plaintiffs' reply evidence is a mere supplement to the evidence offered in its
earlier briefing. Thus, the factual scenario presented in Golden West Fin. has no bearing on the
(continued on next page)

1 29 U.S.C. § 216(b) (Dkt. 15), offered in response to Defendant’s contention that Plaintiffs cannot
2 demonstrate “a sufficiently plausible common theory of liability” (Dkt. 42, at 15). As the court in
3 Moua v. Int’l Bus. Machines Corp. held, evidence cannot be considered “new” where it is a mere
4 response to an argument made in the defendant’s opposition. 2013 WL 685220, *4.

5 Further, Postmates has already had an opportunity to respond to the type of evidence
6 Plaintiffs offered in their reply. Indeed, in Postmates’ response to Plaintiffs’ motion for conditional
7 class certification, Postmates asserted that Plaintiffs’ declarations (which are virtually identical to the
8 declarations submitted in Plaintiffs’ reply) “are devoid of competent evidence suggesting that
9 Plaintiffs or any other putative class members were actually misclassified.” Dkt. 42 at 8. Thus, not
10 only has Postmates already had a chance to respond to the evidence Plaintiffs seek to offer, but, given
11 that Postmates finds such evidence unpersuasive, any concerns that Postmates might be prejudiced
12 by Plaintiffs’ reply evidence are also without merit.

13 For the reasons stated above, the Court should deny Postmates’ request that the Plaintiffs’
14 reply evidence be stricken.
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26 (footnote continued from previous page)
27 situation at hand.
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2 Date: September 18, 2015

3 Respectfully submitted,

4 SHERRY SINGER, RYAN WILLIAMS, RYDER
5 VANDERHEYDEN, STEVEN GRANT, and
6 MICHAEL TSAPATSARIS, individually and on
behalf of all others similarly situated,

7 By their attorneys,

8 /s/ Shannon Liss-Riordan

9 Shannon Liss-Riordan, *pro hac vice*
10 Adelaide Pagano, *pro hac vice*
11 LICHTEN & LISS-RIORDAN, P.C.
12 729 Boylston Street, Suite 2000
Boston, MA 02116
(617) 994-5800
sliss@llrlaw.com; apagano@llrlaw.com

13 Matthew Carlson
14 CARLSON LEGAL SERVICES
15 100 Pine Street, Suite 1250
16 San Francisco, CA 94111
(415) 817-1470
mcarlson@carlsonlegalservices.com

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20 **CERTIFICATE OF SERVICE**

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22 I hereby certify that a copy of the foregoing document was served by electronic filing on
23 September 18, 2015, on all counsel of record.

24 /s/ Shannon Liss-Riordan

25 Shannon Liss-Riordan, Esq.